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CASE # _____

In The Supreme Court Of The United States

October Term, 1996

ALBIN A. RHOMBERG, JOHN BURNS, MICHAEL BURNS, THERESA REALI, SCOTT KILEY, JACK COOKE, JOSEPH SCHEIDLER, AND ESTATE OF JOHN SZABO,*

PETITIONERS

vs.

PETE WILSON; BOB WHITE; MARTY WILSON; PETE WILSON FOR GOVERNOR CAMPAIGN COMMITTEE; PETE WILSON INAUGURAL COMMITTEE; RUSSELL COLLIAU; KAREN MCGAGIN; TOM COOPER; DUANE LOWE; MONTEY HENSLEY; JAMES PENNELL; R. BARTUCCO; J.E. EVERETT; P.D. HARDER; W.E. MACDONALD; A. PEREZ; D.H. PETERS; PETER OSTERGAR; DANIEL LUNGREN, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; CITY OF SACRAMENTO; GREGORY TWILLING; & P. DOWDEN,

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI with Appendix

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THE QUESTIONS PRESENTED FOR REVIEW

1. Was recusal required where, prior to the filing of the lawsuit, the trial judge was an attorney for one Respondent for a significant portion of his legal career, and another Respondent, as U.S. Senator, played an essential and active role in the judge's nomination to the U.S. District Court?

2. Do Catholics, who believe in the sanctity of human life, have standing to assert the rights of the Unborn where, in their own Cathedral, they are arrested for praying for their faith, the Unborn, and the repentance of a pro-abortion governor-elect?

3. Are the Unborn "persons" in the Constitutional sense by virtue of the term "Posterity," as used in the Preamble of the Constitution of the United States, and therefore entitled to defend their lives, and to be defended by third persons, such as the Petitioners in this case?

4. Are Penal Code §§ 145 and 302 repugnant to the 1st Amendment when used to arrest and remove Catholics, who believe a pro-abortion governor-elect celebrating his inauguration in their Cathedral is a sacrilege, praying for their faith, and the repentance of the governor-elect, in the absence of violence or threats thereof?

5. Is there sufficient evidence raising genuine triable issues of fact that either Pete Wilson, Robert White, or both, deprived Petitioners, or caused Petitioners to be deprived of, federally protected rights in the arrest and removal of Petitioners from a Cathedral by virtue of their personal presence, right of control over other Respondents, and direct evidence they controlled the activities of other Respondents?

6. Does good faith depend on the facts observed in the arrest of Catholics in their Cathedral, rather than on the status of state law or the good faith of another person?

7. Did the trial court mislead the jury by following its decision on cross-motions for summary judgment, thus precluding the jury from considering the rights of the Petitioners to be present in the Cathedral to protect their religious beliefs, the rights of the Unborn, and their standing to protect the rights of the Unborn?

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PETITIONERS

vs.

PETE WILSON; BOB WHITE; MARTY WILSON; PETE WILSON FOR GOVERNOR CAMPAIGN COMMITTEE; PETE WILSON INAUGURAL COMMITTEE; RUSSELL COLLIAU; KAREN MCGAGIN; TOM COOPER; DUANE LOWE; MONTEY HENSLEY; JAMES PENNELL; R. BARTUCCO; J.E. EVERETT; P.D. HARDER; W.E. MACDONALD; A. PEREZ; D.H. PETERS; PETER OSTERGAR; DANIEL LUNGREN, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; CITY OF SACRAMENTO; GREGORY TWILLING; & P. DOWDEN,

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

There are no reported opinions below. The opinion of the 9th Circuit appears in the appendix at page A1.

JURISDICTIONAL STATEMENT

1. The decision of the Ninth Circuit affirming the district court was entered on February 18, 1997.

2. Petitioner believes that 28 U.S.C., § 1254(1) and 2101(c) and Supreme Court Rule 13.1 confer *jurisdiction* on this court because the petition seeks review of an action within 90 days of the entry of judgment.

STATUTORY PROVISIONS INVOLVED

The following are involved and set out in the appendix:
The Preamble, p. A9.
The First Amendment, p. A10.

The Fourth Amendment, p. A10.
The Fourteenth Amendment, p. A10.
California Penal Code, § 142, p. A10
California Penal Code, § 302, p. A11
California Penal Code, § 834, p. A 12
California Penal Code, § 836, p. A 12
California Penal Code, § 837, p. A 12

JURISDICTION OF DISTRICT COURT

Jurisdiction of the district court was invoked under 28 U.S.C., § 1343(a)(3).

STATEMENT OF THE CASE

A. INTRODUCTION

This case involves the arrest of Catholics in the Cathedral of the Blessed Sacrament in Sacramento, California, by Respondents acting under color of law on January 6, 1991.

Pete Wilson was elected governor of California at the November 1990 elections. A number of events were organized to celebrate his inauguration. One event was an Event to be held in the Cathedral on Sunday, January 6, 1991, the Feast of the Epiphany, a special day celebrating the visit of the Magi to the Christ Child. To accommodate the Event, the regular 10:00 a.m. Mass was relocated to the basement.

Petitioners disagreed with the decision to: permit the Event in the Cathedral; allow a 'pro-abortionist' use of the Cathedral; and move the Mass to the basement. It upset them to think a 'pro-abortionist' could take precedence over a Mass, and concerned the Blessed Sacrament, the center of their religion, would be present at the Event. These are Catholic concerns, not political ones. It is not surprising in the days prior to the Event, outraged parishioners and other Catholics attempted to have the Event moved elsewhere.

The Pete Wilson Inaugural Committee (hereinafter, Inaugural Committee) had overall responsibility for the Event, while State police were responsible for security. These two groups appointed a head usher with no connection with the Cathedral, to make citizens' arrests if there was, in the usher's opinion, a disturbance. City and State Police worked together for crowd control outside, and to provide a paddy

wagon. The Church was represented in some of these discussions, and made it clear they would not approve the arrest of Catholics in the Cathedral.

There were three opinions as to the nature of the Event. Bishop Quinn thought the Event was a religious service, not to honor Gov. Wilson, but to pray for him and his administration for guidance. (Excerpt,[1] pp. 697, 710, (Rhomberg) 549, (Video, KCRA Segment) 567.) Petitioners, opposed to abortion,[2] felt it was a Sacrilegious Event and a scandal because the public might misinterpret the Church's position[3] on abortion.[4] (Excerpt, p. 711-12.) Respondents felt the Inaugural Event was primarily a government function. (Excerpt, pp. 712, (Robert White) 419.)

At the beginning of the Event, as the clergy were processing from the door to the altar, they were stopped near the door, while a number of people in the front pews were arrested and removed from the Cathedral because they prayed the "Our Father," a religious prayer. Towards the end, as concluding prayers ended, one person appended a prayer reflecting pro-life views and was arrested. After the clergy had left the altar, and the P. Wilson party was departing, one more asked him to change his views on abortion, and he was arrested. All of the arrests were for violating California Penal Code § 302, disturbance of a religious assemblage. See App., p. 11.

The Petitioners engaged only in prayers, some quietly,

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[1] "Excerpt" refers to the record as filed in the Ninth Circuit pursuant to Local rule in lieu of an Appendix of the Record. The following convention is used: (Excerpt, pp. (Name of Person Involved) page (fact), page (fact); (Name) page (fact), etc.)

[2] A Catholic who believes in the teachings of the Church would have to be against abortion. (Excerpt, p. 710.)

[3] A fear which appears to have materialized in view of the public comment of Marie Saroyan, "... a fine event to honor our new governor . . ." (Exhibit P-16, Video Tapes, KCRA Segment, 0:00:29:00.)

[4] It does not offend the Establishment Clause of the 1st Amendment merely because civil enforcement corresponds to the tenants of some religious belief. *Generally, Harris v. McRae* (1979) 448 U.S. 297, 319, 320; *Witters v. Washington Dept. of Social Svcs for the Blind* (1986) 474 U.S. 481. Stated otherwise, that the Fifth Commandment (Exodus 20:13.), in Judeo-Christian ethics, prohibits taking human life does not prevent civil enforcement of murder laws or feticide.

some moderately loud. There was no violence, and no express words uttered regarding abortion, until the end. Thus, this case is essentially one of wrongful arrest, based on speech, prayer, protected by the 1st, 4th, and 5th Amendments, which cannot amount to a crime, excessive force and false imprisonment, by the respondents acting under color of law in an effort to silence the pro-life voice.

The respondents' defense to liability was a claim they either had probable cause, or acted in good faith reliance on §§ 145 or 302, and therefore they are immune.

B. PROCEDURAL HISTORY

A civil rights action under 42 U.S.C., § 1983, etc., was filed on January 6, 1992. Amended complaints were filed on 4/24/92, 11/9/92, and 9/9/93. (Excerpt, pp. 1542, 1549, 1554.) The issues raised here are raised by the pleadings.

On March 18, 1994, Petitioners moved, amended on March 19, to recuse Judge Burrell. (Excerpt, p. 1559.) On April 8, 1994, the only opposition to be filed was filed by the Pete Wilson for Governor Campaign Committee (hereinafter, Campaign Committee), Inaugural Committee, Colliau, M. Wilson, and Tom Cooper. (Ibid.) On April 15, 1994, Petitioners filed a timely reply. (Excerpt, p. 1559.) On May 17, 1994, Judge Burrell denied the motion. (Excerpt, p. 1560.) A petition for writ of mandate in the Ninth Circuit was denied on or about March 13, 1995. (Excerpt, p. 1574.)

On May 27, 1994, Wilson and White moved for summary judgment, raising immunity issues. (Excerpt, p. 1562.)

On June 17, 1994, Lungren and Lowe moved for summary judgment solely on issues relating to §§ 145 or 302 and standing. (Excerpt, p. 1562.)

On June 24, 1994, the City Of Sacramento (hereinafter, Sacramento), Dowden and Twilling each moved separately for summary judgment, raising immunity and good faith defenses. (Excerpt, pp. 1563-64.) The Campaign Committee, Inaugural Committee, Colliau, Dan Schnur, M. Wilson, Tom Cooper also moved for summary judgment relating to immunity and good faith. (Excerpt, p. 1564.) The State Police Officers, Everett, Harder, MacDonald, Perez, Peters, Oster-

gar, and Pennel also moved for summary judgment relating to immunity and good faith. (Excerpt, p. 1565.)

On August 5, 1994, the court consolidated all motions and reset them to be heard on September 12, 1994, and eventually, the matter was heard and submitted on January 5, 1995. (Excerpt, p. 1567, 1573.) All motions were met with timely oppositions and replies. The court filed its order on February 23, 1995. (Ibid.) Petitioners moved for reconsideration on March 6, 1995. (Excerpt, p. 1574.)

During the trial, just before the jury was instructed, petitioners objected to the jury instructions given.[5]

On or about June 28, 1995, all Petitioners,[6] except Albin Rhomberg, settled with the Wilson Campaign Committee, the Wilson Inaugural Committee, Martin Wilson, Tom Cooper, and Russell Colliau only. (Excerpt, p. 1584.)

C. SUMMARY OF MATERIAL FACTS

1. The Cathedral, And Coordination

The Cathedral of the Blessed Sacrament is located 1 block from the State Capitol. On Friday, January 4, 1991, Msgr. James Kidder, pastor, met with members of the Inaugural Committee and State Police. (Excerpt, (MacDonald) 166-67, (Report) 952-55, (Colliau) 114, (Cooper) 1133-34, (Hensley) 1143, (Everett) 1132-40.) During the meeting (See post, at page 5.), security and a copy of an Anti Desecration League letter were discussed. Abortion protests were anticipated at the Event. (Excerpt, pp. (Everett) 1139, (Hensley) 1142, 1142A, 1144-49, (Quinn) 1189.) Msgr. Kidder told those present he did not want arrests. (Excerpt, pp. 869, 1166.)

2. Petitioners' Activities Prior to Event

Petitioners are Catholic, and therefore "pro-life." (Excerpt, p. 675, 711-12.) About a week before the Event, a number of Catholics learned of the Event and began calling

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[5] The Ninth Circuit held there was no objection. That is error. Both the trial record and the appellate record show two objections were made orally, and one in writing. (Excerpt, pp. 1503-04, 1507-08.)

[6] In fact, these Petitioners and Respondents settled before trial, but not finalized until after trial. The record is not very clear with respect to the settlement.

and informing other Catholics of what was happening and invited them to the 8:00 a.m. mass (hereinafter, Mass) before the Event, and to remain and pray after the Mass. (Excerpt, pp. 673-75, (R. Szabo) 526, (Cooke) 574, 1106, (Scheidler) 562, (M. Burns) 553, (Shunk) 208, (Kiley) 1169-76, (J. Burns) 614, 1053-54.) There were concerted efforts, by peaceful means, to move the Event elsewhere. (Excerpt, p. 1206-13, 1419.)

Prior to the Event Scheidler called and asked Msgr. Kidder to add a prayer for the Unborn, to ameliorate any misunderstanding about the Church's position on abortion. Msgr. Kidder left the impression he would do so. (Excerpt, pp. (Scheidler) 1215-18.) J. Burns also called the Chancery and left a message for the Bishop complaining about the Event in the Cathedral. (Excerpt, p. 1055.)

Each of the Petitioners planned to attend the Event to pray, but had not planned to demonstrate, create a disturbance, or to express their opposition to the Event in the Cathedral. (Excerpt, pp. 520-640, (Cooke) 304, 1108, 1110-11, 1118A, 1118B, (Shunk) 1225, (J. Burns) 1043, 1059, 1063-65, (J. Burns) 929-23.) They decided to attend the Mass in discharge of their Sunday obligation before the Event, and either stay inside and continue praying, or go outside to demonstrate. (Excerpt, pp. (J. Burns) 930, 1037, 1044, 1048-50, 1063-65, (M. Burns) 935, 1069, (Kiley) 1169-76, (Cooke) 304, 674, 1107-08.) They did not consider the Event to be a religious service but a party to celebrate Wilson's election. The last thing they expected was to be forcibly removed for praying. (Excerpt, pp. (M. Burns) 554-55, 1073-75, 1081.)

3. Petitioners' Event activities before arrest

The morning of the Event, some of the Petitioners, traveling separately, arrived on time for the Mass, and remained to pray. (Excerpt, pp. (M. Burns) 1070-72, 1076, (J. Burns) 1037, 1040-42, 1048-49, (R. Szabo) 1227, (Kiley) 1177, (Reali) 193, 195, (Scheidler) 1219, (J. Hockel) 1453-65.) Laurette Elsberry picked up Rhomberg and took him to the Cathedral for the Mass. (Excerpt, p. 682.) Upon entering, she observed the Szabos, Paula Burbach, Theresa Reali, Scott Kiley, and Richard Szabo's father inside. (Ibid.) Some arrived too late

for the Mass, but joined those who remained after the Mass to pray. (Excerpt, pp. (Shunk) 938-39, 1221-24, (Cooke) 1108.) One Petitioner changed his mind about going outside, and remained inside to pray. (Excerpt, pp. (Cooke) 1109, 1119.) Some of them decided to go up front, right in front of the altar, after Mass. (Excerpt, pp. 678, (Rhomberg) 1213, (R. Szabo) 1230, (Kiley) 540, (Reali) 1193, 1195.) Elsberry left before the end of the Mass to call and inform Paul Laubacher the Event was proceeding, Catholics were ready to remain and pray, with no indication of removals. This allowed Laubacher to fax the January 6 letter to Wilson and the media. (Excerpt, pp. 682, 689.)

As some of the Catholics were praying, some plainclothes persons approached and requested they move, saying something about citizens' arrests. (Excerpt, p. 545, 679 (Msgr. Kidder).) They did not move. (Excerpt, pp. (R. Szabo) 949, (Reali) 1192-94.) Reali was never approached by Colliau and asked to cease her activities. (Excerpt, pp. (Reali) 226-28, 230, 238, (Bartucco) 342, 348-51.) Bishop Quinn granted Petitioners permission to remain in their pews to pray and refused permission to remove them when requested by the Respondents. (Excerpt, pp. (McGagin) 1187, (Kidder) 485), (Quinn) 506, 508, (Colliau) 439, (Cooper) 522-23, 679.) Instead, Wilson and his guests were moved to another front section. (Excerpt, pp. (Kidder) 868, (Quinn) 506, 508, 680.) Neither the Bishop nor Msgr. Kidder considered Petitioner's activities disruptive. (Excerpt, pp. 485, 679.)

At 10:00 a.m., prelude music was provided to set the mood while people were being seated. While the VIPs and other attendees were entering the Cathedral, greeting each other and conversing, the Petitioners were kneeling in different areas at the front of the Cathedral and individually praying the Holy Rosary. (Excerpt, p. 685.) As the Choir began singing the "Battle Hymn of the Republic", Fr. Carl Steinauer invited the congregation to stand, but P. Wilson motioned for everyone to sit. (Excerpt, pp. 389, 684, 686, 687-88.) Petitioners stood with the Congregation and started praying, and the arrests began. (See post, page 10.)

4. Respondents' Relationship & Activities

The Campaign Committee existed to direct the campaign that resulted in the election of Pete Wilson. The Inaugural Committee was formed for the sole purpose of organizing six events relating to Wilson's inauguration as Governor.[7] (Excerpt, pp. (Committee Exhibit) 1433-52, (Cooper) 1126-27, (Rhomberg) 1433.) White was the CEO of the Inaugural Committee. (Excerpt, p. 713, (Rhomberg) 649-51, 1436.)

P. Wilson, White, and Otto Bos were in charge of the Transition Office and exercised ultimate control over the Inaugural Committee, which took over the Campaign office and furniture. (Excerpt, p. (M. Wilson) 78, 79, 399, 861-62, 1240, 1244, 1246.) Most of the workers from the Campaign Committee went to work for the Transition Office to prepare to take over the government, while others went to the Inaugural Committee. (Excerpt, p. (M. Wilson) 861-62, 1243-44; Excerpt, pp. (McGagin) 101-02, 1185; Excerpt, pp. (Wilson) 1247-48, (Cooper) 1128-29, 1135; Excerpt, pp. (Cooper) 93, 94, 1131-32; Excerpt, pp. (Colliau, 110, 135, 1092-93, 1104.)

Robert White had been Wilson's Chief of Staff since 1963, during a period Wilson held a number of public offices, with a reputation of being Wilson's alter ego, such that speaking to White was the same as speaking to Wilson. (Excerpt, p. 709.) Ultimately, everybody reported to him. (Excerpt, pp. (White, 415-16.)

White appointed (Excerpt, p 671.), and P. Wilson personally approved, Martin Wilson as Director of the Inaugural Committee (Excerpt, pp. 710, (M. Wilson) 77, 78, (McGagin) 1186.) M. Wilson ran the operations assisted by Deputy Director Patricia Clarey, Wilson's Deputy Chief of Staff. (Excerpt, pp. (M. Wilson) 77, 78, 861, 1242 (McGagin) 1186, 692, (Clarey) 1090.) Tom Cooper and Karen McGagin were responsible for the Event and reported directly to Clarey and M. Wilson. (Excerpt, pp. (Cooper) 93-95, (McGagin) 100-01, 105-08, (M. Wilson) 79, 671, 1249-50.)

Lt. Montey Hensley, of the California State Police, was responsible for the security at the Event. (Excerpt, p. 697.)

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[7] Pursuant to Inaugural Committee's Bylaws, Art. VI, § 5, the CEO "Shall have general supervision, direction and control of the business of the corporation." (Excerpt, p. 1439.)

MacDonald and Jerry Everett were involved with threat assessment for all of the events. (Excerpt, pp. 952; Ante, page, 5.) Cooper, McGagin, Hensley, MacDonald, Everett, and Colliau were present at the Cathedral meeting regarding security. (Ante, p. 5; (Excerpt, pp. (MacDonald) 952, (Colliau) 114, (Cooper) 1134 - 35.)

Colliau was volunteer head usher, designated to make citizen's arrests, given additional duties and training by state police, and part of security. (Excerpt, pp. 671, (Colliau) 110, 113, 115, 135, 1094-97, 1102, 1104, (Hensley) 1150-52.)

P. Wilson did not personally attend or participate in any meetings, or discussions on arrests or removals, however, he and White were briefed on security matters, and kept up to date on planning activities. (Excerpt, pp. 702-03, 710.) An Event schedule was sent to Clarey, raising an inference the schedule was prepared in advance, subject to Wilson's control and supervision. Wilson and White were aware of the Church's position on arrests. (Excerpt, p. 692, 710.) White learned of the Anti-Desecration League Letter before arriving at the Cathedral. (Excerpt, p. 701.)

5. The Evidence against P. Wilson, White, et al.

Pete Wilson was present at the Event, with his chief lieutenant, White, only a few feet away. (Excerpt, p. 701.) A number of **witnesses** saw P. Wilson confer with White and Colliau, those around him, to motion to everybody to sit down (Excerpt, pp. (J. Burns) 618-19, 1044, 1047, 1078-80.).

White expressed displeasure with Petitioners to Pennel that was passed on to Hensley. (Excerpt, pp. (Rhomberg) 549, (Video) 567, 658, (P. Wilson) 492, 496, 497, (White) 406, 407, 408-10, 415-16, 1235-38, (**Pennel**) 462 (talks to White), 462 (demonstrators), 463 (removal; P. Wilson present), 464 (wished demonstration could be ended).) Witnesses saw Colliau, apparently in charge, speak with others, and the arrests began evidently on directions of P. Wilson and White. (Excerpt, pp. 560, 690-91, 693-95, 695-97, 701, (J. Burns) 200-01, 1018.), (Rhomberg) 549, (Video: Chan. 10 segment 00:00:32:24 - 00:00:39:28l Chan. 13 segment 00:00:37:00 -

00:00:43:20) 567, (Peters/Perez Report) 965, (Everett report) 991.); p. 1044-47.). **Respondent Pennel corroborated the sequence of events, and what was said.** (Excerpt, pp. 462 (White), 462 (demonstrators), 463 (removal; P. Wilson), 464 (wished demonstration could end), 515 (Pennel's Report).)

6. Evidence against City and Lt. Twilling

Photographs and video show Lt. Twilling inside the Cathedral aiding the removal of R. Szabo, J. Szabo, and Kiley. He is then seen coming from the direction of the South door, just prior to the removal of J. Szabo, less than a minute after Reali was taken out through the South door. (Excerpt, pp. (J. Hockel) 1453-65, (Hensely) 1153-54 (ID of Twilling), (Elsberry) 980, (Rhomberg) 549, (Video) 567.) Another videotape shows Twilling outside the Cathedral watching and smiling as R. Szabo is roughed up by City police officers Chuck Sandoval and Geoffrey Winford. (Excerpt, pp. (Winford) 1251-56, (Twilling) 1233, (Rhomberg) 549, (Video Tape Channel 10 segment, CTL 00:00:42:28-00:00:45:16) 567, (Jensen) 1156.) According to Deputy Chief Fred Arthur, Twilling should involve himself in arrests or removals only if there is violence. Petitioners caused no violence within the Cathedral. (Excerpt, pp. 1484-86.)

With the apparent encouragement of his superiors, Dowden proceeded to threaten and insult Reali in an outrageous manner while she was barely conscious and handcuffed in a manner causing unnecessary pain and injury. (Excerpt, pp. (Baggett) 1026-32 (description of treatment).)

City Police have a custom of ignoring injury complaints of so-called "pro lifers" due to alleged exaggeration of those injuries. They are only transported to the hospital if they are bleeding, had discernible swelling or bruises, or were vomiting. (Excerpt, pp. (Ridge) 1485, (Baggett) 1026-32 (Theresa Reali's treatment).)

All Petitioners, except Reali, were escorted to a paddy wagon and driven to the city police station at 613 6th Street. (Excerpt, pp. (MacDonald) 1180-83.)

7. Arrest of Albin Rhomberg.

As the choir began singing, Mr. Rhomberg stood with the

congregation, while praying the Lord's Prayer, but could not be heard one seat away. (Excerpt, pp. (A. Tisdale) 1476-787.) As he stood, he was approached by Colliau, seen on video, and allegedly informed it was illegal to disrupt a religious service and then something about citizens' arrest. (Excerpt, p. 592, (Rhomberg) 549, (Video) 567.).) Officers Nicholas Perez and David Peters immediately dragged him from his pew. (Excerpt, pp. 593, 1205, (Rhomberg's description) 549, (Video) 567, (Police Report) 991.)

8. Arrest of John Burns.

J. Burns was with his ten-year-old daughter, Colleen. When the choir began signing, J. Burns stood with the congregation, and started reciting the Lord's Prayer with others. (Excerpt, pp. (Kidder) 486, (J. Burns) 619, 1066, (Kiley) 542-43, (Cooper) 1054, (Colliau) 1103, (M. Burns) 1072.) Persons around them during his prayers did not hear them. (Excerpt, pp. (A. Tisdale) 1476-78, (N. Keim) 1159, (M. Burns) 557, 1077.) Sgt. Ostergar approached, grabbed him by the upper arm (Excerpt, pp. (J. Burns) 1062.), and removed him from the Cathedral. (Excerpt, pp. (Ostergar's report) 967.) Ostergar threatened to take J. Burns' daughter if he did not cooperate. (Excerpt, pp. 200-01, 1043.) Outside, he was turned over to City police (Excerpt, p. 1043.), who twisted his arm rather forcefully. (Excerpt, pp. 1067.)

9. Arrest of Michael Burns

Burns was praying when the choir began singing. He stood with the rest of the congregation, continuing his whispered prayer of the rosary, not the Lord's Prayer, to himself. (Excerpt, pp. (M. Burns) 556-56, 936-37, 1083-84.) No one nearby heard him praying. (Excerpt, pp. (Tisdale) 1476-78, (Keim) 1159.) When the arrests started, he knelt down and continued praying the rosary silently, in fear of being "brutalized" too. (Excerpt, pp. 1082-83.) As he silently prayed, Ostergar said, "Come on, why don't you make this easy on us because, you know, if you don't come with us, we'll have to drag you out." (Excerpt, pp. 1082-83.) He was grabbed and removed as he prayed silently. (Excerpt, pp. (Ostergar) 967, (M. Burns) 1084-85, 1087.).

10. The Arrest of J. Szabo

John Szabo, 81 years old, was in frail health, and had undergone heart bypass surgery. (Excerpt, p. 227, 1228.) His voice was gravely and he could not speak very loud because of a throat condition. (Excerpt, p. 1228.) As the choir began singing, his gravely voice could not carry across the aisle. (Excerpt, p 957.) When approached by Bartucco, he was half kneeling/half seated in the far right side of the front pew. He resisted attempts to remove him from the Cathedral. (Excerpt, p. (Reali) 227.) As Bartucco and others removed Reali, Szabo called out, "My daughter, my daughter." (Excerpt, pp. (Burbach) 1035, (Elsberry) 972, 978.) MacDonald was motioned by Sgt. Ostergar, to aid Everett in the removal of J. Szabo, and did so. The arresting officers can be seen on video hustling Mr. Szabo across the front of the Cathedral twisting his arm.

11. Arrest and mistreatment of Theresa Reali

Reali's father was across the aisle, about 5 feet away, in a seated position, and she was on her knees praying the rosary quietly. As Bartucco approached her father to remove him, Reali rose and approached to tell Bartucco about her father's frail health. (Excerpt, 226-27.) Bartucco immediately grabbed her arm and told her she was being taken out. (Excerpt, pp. (Judie Hockel) 1453-65, (Rhomberg's description) 549, (Video) 567.) Two more men surrounded her, turned her in the process, to drag her backwards, past a large pillar directly south of her pew, where they forcibly dropped her, causing her head to strike the floor. Her head immediately felt as if it was splitting, and she suffered severe pain. (Excerpt, pp. (Reali) 1196.) She remembers being dragged to the South door, handcuffed, passed to City police outside, and a flash of bright light, but does not recall how she got to the Board of Corporations (BOC).[8] (Excerpt, pp. (Reali) 1197-98, (Baggett) 1028-29, 1479-83.) Upon arri-

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[8] Reali was taken to the BOC Building by City police officers, David Kidd and Keith Jensen on orders from Sergeant Patrick Dowden, Sacramento City Police, who was in charge of the SWAT team that day. (Baggett, 18:25-28, 19:17-22; Kidd, 13:13-16, 15:14-22; Reali, 74:28-75:10)

val, she was placed in a chair with her hands held behind her back by steel handcuffs, the entire time she was there, with her rosary entangled in her fingers, hands and wrists. At some point she was allowed to put her head down on a table on some magazines. During her detention, she, and Jay Baggett requested medical attention, more than once, which Dowden denied with the observation she was not bleeding and did not need medical attention. (Excerpt, pp. (Reali) 221-22, 1201), (Baggett) 1030, 1479-83.) When Baggett begged, Officer Keith Jensen, radioed "the prisoner is complaining of dizziness". A voice sounding like Dowden's replied, "well, aside from being retarded, what's her problem?" (Excerpt, pp. 1157, (Baggett) 1031, 1479-83.) While being detained, Dowden subjected Reali to: threats; abuse; told her to "shut up" when she moaned from her pain; used obscenities; spoke in a taunting manner about his atheistic and pro abortion views; called her a religious fanatic; and, struck his hand and thigh with his night stick in a threatening manner at her, putting her in extreme fear for her safety. (Excerpt, (Reali) pp. 1200-03, pp. (Baggett) 1032, 1479-83.) During this time, she was in extreme pain, and was not fully conscious all the time. (Excerpt, pp. 1199.) She was held for about one and one half-hour before being transported to the police station. (Excerpt, pp. 1479-83.)

12. The Arrest of Scott Kiley

As the choir began singing, Kiley stood with the congregation, and began reciting the Lord's Prayer. (Excerpt, p. 274.) While standing, citizens' arrest was mentioned so they resumed a kneeling position and the rosary. (Excerpt, p. 279) Without further warning, Kiley was removed by State Officer Bartucco and City Police Lt. Twilling. (Excerpt, pp. (Kiley) 281, 1178, (Judie Hockel) 1453-65, (Rhomberg), 649, (Video) 657.) During the removal, Bartucco twisted Kiley's arm causing very painful injuries. (Excerpt, p. 1179.)

13. The Arrest of Joseph Scheidler

When Msgr. Kidder finished the concluding prayers without a prayer for the Unborn, Scheidler added, "And may Governor-elect Wilson— denounce his pro-abortion

position, which has made this ceremony a sacrilege." (Excerpt, pp. (Scheidler) 563, 946, (Elsberry) 698, 972, 987.) Beth Hockel then handed him a banner reading "Sacrilege" that she had under her coat. (Excerpt, pp. (E. Hockel) 698, 1471-75.) Scheidler was prevented from displaying it because Officers Harder and Ostergar, assisted by Pennel and Elizabeth Jeske, arrested and removed him from the Cathedral. (Excerpt, pp. 705, (Harder) 964, (Ostergar) 968, (Rhomberg), 649, (Video, 2nd segment 03:10:28) 657, (Judie Hockel) 1453-65 w/photos.)[9]

14. The Arrest of Jack Cooke

As Wilson and his wife departed down the center aisle toward the main exit, and were about three feet away, Cooke said spontaneously in a loud voice, "What are you going to do about murdering millions of Unborn children in the state?" (Excerpt, pp. 698, (Cooke) 1124.) Pennel and Officer Harder claim Cooke appeared to lunge at Wilson, then reach out, as if he intended physical contact with Wilson. (Excerpt, pp. 699, 700.) They considered Cooke a threat to Wilson. (Excerpt, p. 699.) Cooke denies lunging, as officers were blocking his way to Wilson. (Excerpt, pp. (Cooke) 583, 1120, (Rhomberg) 549, (Video, Ch. 10) 567.) Jeske and Harder held Cooke until Wilson had passed then arrested, seized and dragged him out of the pew. (Excerpt, pp. 699, (Colliau) 1198-01, (Cooke) 309, 1099-01, (Harder) 964, (Ostergar) 968, (Pennel) 515, (Rhomberg) 549, (Video) 567, (Judie Hockel) 1453-65, w/attachments, 705.)

After being grabbed, he attempted to genuflect to the Blessed Sacrament, a form of religious worship, but was grabbed by the belt and lifted. He was handed over to uniformed officers and placed in a paddy wagon. (Excerpt, pp. 583, (Cooke) 1114-16, 1117-18, 1121-23.) Cooke is identified on television news clips.

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[9] Msgr. Kidder opined Scheidler would not have been removed under Cathedral policies. (Excerpt, p.715.) Others believe it was a prayer. (Excerpt, pp. (Kidder) 1167, (J. Hockel) 1453-65, (Jack Hockel) 1466-70, (E. Hockel) 1471-75, (Cooke) 580-81, 1113, (Elsberry) 972.)

SUMMARY OF ARGUMENTS

1. Recusal was required where, prior to the filing of the lawsuit, the trial judge was an attorney for one Respondent for a significant portion of his legal career, and another Respondent, as U.S. Senator, played an essential and active role in the judge's nomination to the U.S. District Court.

2. Catholics, who believe in the sanctity of human life, do have standing to assert the rights of the Unborn where, in their own Cathedral, they are arrested for praying for their faith, the Unborn, and the repentance of a pro-abortion governor-elect.

3. The Unborn are "persons" in the Constitutional sense by virtue of the term "Posterity," as used in the Preamble of the Constitution of the United States, and therefore entitled to defend their lives, and to be defended by third persons, such as the Petitioners in this case.

4. Penal Code §§ 145 and 302 are repugnant to the 1st Amendment when used to arrest and remove Catholics, believing a pro-abortion governor-elect celebrating his inauguration in their Cathedral is a sacrilege, praying for their faith, and the repentance of the governor-elect, in the absence of violence or threats thereof.

5. There is sufficient evidence raising genuine triable issues of fact that either Pete Wilson, Robert White, or both, deprived Petitioners, or caused Petitioners to be deprived of, federally protected rights in the arrest and removal of Petitioners from a Cathedral by virtue of their personal presence, right of control over other Respondents, and direct evidence they controlled the activities of other Respondents.

6. Good faith does depend on the facts observed in the arrest of Catholics in their Cathedral, rather than on the status of state law or the good faith of another person.

7. The trial court did mislead the jury by following its decision on cross-motions for summary judgment, thus precluding the jury from considering the rights of the Petitioners to be present in the Cathedral to protect their religious beliefs, the rights of the Unborn, and their standing to protect the rights of the Unborn.

ARGUMENT

I.

THE LOWER COURTS DECIDED AN IMPORTANT QUESTION REGARDING RECUSAL NOT DIRECTLY FACED BY THIS COURT, THAT APPEARS TO BE INCONSISTENT WITH PRECEDENT, OR REQUIRES THE SUPERVISORIAL HAND OF THIS COURT

The trial judge came to his present bench in a process that significantly involved Pete Wilson, and worked most of his professional career as a deputy City Attorney for Respondent Sacramento. His last employment with Sacramento was near in time to the events in this case, and about a year prior to the filing in the district court. (Excerpt, pp. 54-60.) A timely motion was made to recuse. The judge denied the motion. (Excerpt, p. 1560.)

The trial court summarily denied the motion to recuse. The Ninth Circuit, relying on Ninth Circuit precedent, ruled that neither Wilson's recommendation, standing alone, nor former employment as [Deputy] City Attorney establish a sufficient basis for questioning impartiality. App., p. 8.

In *Liljeberg v. Health Services Acquisition Corporation*, 486 U.S. 847 (1988), the Court held the statute, reasonably construed, required recusal where a judge's *impartiality might reasonably be questioned*, and recusal was required because the judge had been a member of the Board of one of the parties involved in the litigation.[10] *Accord, Aetna v. Lavoie*, 475 U.S.

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[10] Respondents cited a number of cases that are clearly *distinguishable*. Because executive authority appoints nearly all judges, the rule of necessity does come into play. (C.f., *United States v. Will*, 449 U.S. 200 (1980) (Judge's compensation; qualifications of judge; rule of necessity; someone has to decide) *with Aetna v. Lavoie, supra* (State supreme court; one justice held a policy issued by Aetna; recusal required).) Stated otherwise, if the executive is a party to a lawsuit, but there is no judge available the executive did not appoint, then the rule allows that some judge shall have to decide the case, notwithstanding. In each of the following recusal was **not required** because the executive, or **appointing authority**, was **not a party**: *Hirschkop v. Virginia State Bar*, 406 F. Supp. (N.D. Va. 1975); *Venuto v. Witco Co.*, 808 F.Supp. 387 (D.N.J. 1992). In the following, recusal **not required** in criminal case merely because the **judge was an ex-prosecutor**: *United States v. DeLuna*, 763 F.2d 897, 907-08 (8th Cir. 1985); *Jenkins v. Bordenkircher*, 611 F.2d 162, 165-67 (6th Cir. 1979). In the fol-

813 (1986) (Held an Aetna policy.)

In this case, the sitting judge had a substantial relationship with one of the Respondents within 2 years of the incident giving rise to this action, and sits by virtue of an appointment initiated by another Respondent. All of this raises serious and important questions regarding the administration of justice, and presents an opportunity to clarify under what circumstances a judge ought to be recused.

II.

THE LOWER COURTS DECIDED IMPORTANT QUESTIONS OF LAW REGARDING STANDING, PETITIONERS' RIGHTS, AND THOSE OF THE UNBORN, PART OF A CONTINUING PUBLIC CONTROVERSY, INCONSISTENTLY WITH PRECEDENT, AND BECAUSE PETITIONERS CAN POINT TO EXPRESS WORDS THAT INCLUDE THE UNBORN AS CONSTITUTIONAL PERSONS, THIS COURT OUGHT CONSIDER AND RESOLVE THESE IMPORTANT ISSUES AT THIS TIME

A. THE STANDARD FOR SUMMARY JUDGMENT

A reviewing court is not limited to the law cited in the Trial court, but in fact must consider all applicable law *de novo*. *Elder v. Holloway*, 114 S.Ct. 1019 (1994). A court will not grant a motion for summary judgment if, after viewing the evidence in the light most favorable to the party opposing the motion, the court finds a genuine issue of material fact and determines that the moving party is not entitled to judgment as a matter of law. *Matsushita Elec. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 552-53 (1986). If the nonmoving party produces direct evidence contradicting direct

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lowing, recusal was **not required** for **failure to show extra-judicial conduct**: *Ainsworth v. Combined Ins. Co. of America*, 774 P.2d 1003 (Nev. 1989); *Liteky v. United States*, 510 U.S. 540 (1994).) In the following **recusal was required**: *Taylor v. Hayes*, 418 U.S. 488 (1974) (judge had been the object of newspaper's wrath; bias existed); *Home Placement Service, Inc. v. Providence Journal Co.*, 739 F.2d 671 (1984). In the following, there was no challenge for bias, and the rule of necessity may have been applicable, intergovernmental litigation: *Wilson v. Eu*, 1 Cal.4th 707 (1992); *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

evidence, the court must assume the truth of the evidence as to that fact. *Tirona v. State Farm Mut. Auto Ins. Co.*, 812 F.Supp. 1083, 1085 (HI 1993), *citing T.W. Electrical Services, Inc. v. Pacific Electrical Contractors, Ass'n*, 809 F.2d 629 (9th Cir. 1987). The court must resolve all reasonable inferences in favor of the non-moving party, and if the opposing party has available witnesses and evidence that demonstrates more than some metaphysical doubt as to the material facts, evidence of a genuine triable issue of fact, it must deny the motion. *Matsushita Elec. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 552-53 (1986).

As to standing, Petitioners' rights in their Cathedral, and the Unborn, the lower courts appear to have decided important issues that, in part, depart from precedent of this Court, and as to the Unborn, in a manner that departs from the direction this court has been taking, justifying review of an extraordinary event that constitutes but a thread in the fabric of events that has torn the nation asunder, to clarify the rights of "Ourselves and our Posterity."

B. THE LOWER COURTS DECISION ON STANDING IS INCONSISTENT WITH PRECEDENT IN THIS COURT

The Ninth Circuit ruled Petitioners lacked standing to challenge the state statute because they have "failed to demonstrate a credible threat of immediate future harm," *citing, inter alia, Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983), and as to protect the Unborn because "ordinarily, one may not claim standing . . . . . to vindicate the constitutional rights of some third party," *citing Barrows v. Jackson*, 346 U.S. 249, 255 (1953). App., p. 3.

This Court has held that where fundamental rights are implicated, third party standing will be permitted to vindicate the rights of parties not before the court, if there is sufficient adversariness to protect the integrity of the adversary process and the issues are of sufficient concrete facts to avoid advisory opinions. (*E.g., Craig v. Boren*, 429 U.S. 190, 192-93. (1976).) *Craig* involved a challenge to a State statute regulating sales of alcoholic beverages by a male who turned 21 during the suit and a vendor of alcoholic beverages. Pur-

portedly exercising its powers under the 22nd Amendment, the State set the legal drinking age for females at age 18 and for males at age 21. The male was dismissed as moot because he no longer would be affected by the State regulation. However, the court noted the vendor was still affected by the restriction, and moreover, while a class action by 18 year olds was maintainable, it was equally maintainable by the vendor and practical to do so because the vendor was directly affected.

By far, the easiest case for standing is that for the Unborn. Because they are Unborn, obviously they cannot protect their own rights in the courts. Other than 5 *amicus curiae* cases,[11] there is not a single case in this Court addressing whether the Unborn are protected by the Preamble, and the term 'posterity.' This court has historically permitted standing to vindicate rights of those not before the court, those who might themselves be unable to vindicate their own rights, such as the Unborn.

The second case for standing, whether §§ 145 or 302, either facially, or as applied in this case, can, consistently with First Amendment values, permit a peace officer to exercise a religious opinion as to what constitutes a proper prayer, or is disruptive, is one of first blush, but in the context of a continuing controversy over abortion, and the continuing turmoil in the streets, to claim that petitioners can show no future possibility of a problem is disingenuous at best, and ignores important social and emotional turmoil that has no signs of abating. See Post, p. 26.

Finally, respondents were relying for their good faith belief on §§ 145 and 302 in this controversy. If Respondents have standing to claim the protection of §§ 145 and 302, then Petitioners should have reciprocal standing to show its invalidity, and the lack of a basis for a good faith belief in its validity. *E.g., Tennessee v. Garner*, 471 U.S. 1 (1985) (Fleeing felon statute unconstitutional; officer limited to good faith).

It is clear that as to the issue of standing, the court's decision conflicts with this Court's precedent requiring review

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[11] See, Lynch, op. cit. 40 AJJ 401,fn. 1.

by this Court to consider this important question.

C. WHETHER THE UNBORN ARE MEMBERS OF 'POSTERITY' IN THE PREAMBLE IS AN IMPORTANT ISSUE THIS COURT HAS NOT HAD THE OPPORTUNITY TO FACE DIRECTLY, AND DECIDED BELOW IN A MANNER INCONSISTENT WITH THE DIRECTION THIS COURT HAS BEEN TAKING

The Courts below did not reach the merits of whether the Unborn are members of Posterity, deciding Petitioners lacked standing. App., p. 4. *Roe v. Wade*, 410 U.S. 113 (1973),[12] *held* as it did because Texas failed to show text in the Constitution inclusive of the Unborn. (Id, at 157-59.)

Statutes or practices inconsistent[13] with the Constitution, however numerous, can create neither a power which the Constitution does not bestow nor furnish a construction[14]

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[12] The Petition, Response, and Briefs by the parties and *amicus* in *Roe v. Wade*, shows the arguments focused on the term 'person' as used in the 5th and 14th Amendments of the Constitution. (75 Landmark Briefs and Arguments of the Supreme Court of the United States.)

[13] This Court, with characteristic good grace, has invalidated its own Rules of Court, in part, based on a Congressional Statute requiring attorneys to take an oath with respect to activities before the Civil War, when it was pointed out that the provision was unconstitutional. *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867). Faced with the Constitutionality of "separate but equal" facilities, a practice in existence for nearly 60 years, and sanctioned by this Court, this Court *overruled*, and rightfully so, *Plessy v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*); *accord, Bolling v. Sharpe*, 347 U.S. 497 (1954). Moreover, where the importance of the question is great, and touches sensitive issues in need of resolution once and for all, this court has not allowed the fact that some issues were not properly addressed in the courts below from ordering argument on the omitted issues to settle the continuing controversy. *Brown I*, 347 U.S., at 488-89, 496; *Brown v. Board of Ed.*, 349 U.S. 294, 298 (1955) (*Brown II*) (Nature of remedy).

[14] The same rule of interpretation, and sources of judicial information, may be resorted to as in the construction of statutes and other instruments granting power. *Adams v. Storey*, 1 Paine (U.S.) 79, 1 Fed. Cas. page 141, 145 (1817). The constitution and the law are to be expounded without leaning one way or the other, according to those general principles that usually govern the construction of fundamental or other laws. *Bank of the United States v. Deveaux*, 5 Cranch (9 U.S.) 61, 85, 3 L.Ed. 38 (1809). No word or clause can be rejected as superfluous or unmeaning, but each must be given its due force and appropriate meaning. *Wright v. United States*, 302 U.S. 583, 588 (1938); *Knowlton v. Moore*, 178 U.S. 87 (1900). Words and terms are to be taken in the sense they were used and understood at common law and at the time the constitution and the amendment were adopted. *Veazie Bank v. Fenno*, 8 Wall (75 U.S.) 533, 542 (1869); *Locke v. New Orleans*, 4 Wall (71 U.S.) 172 (1866); *Gibbons v. Ogden*, 9

which the Constitution does not warrant. (*Field v. Clark*, 143 U.S. 649, 691 (1891); 3 Rotunda, TREATISE ON CONSTITUTIONAL LAW § 23.33, p. 512 (1986).) This court can judicially notice the impact of the abortion cases on society. Similarly, it is common news that throughout the country, the abortion controversy has led to disorder in the streets.[15] Moreover, the *Roe Decision* "has proved "unsound in principal, and unworkable in practice." *Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1989).

Roe does not address the term "Posterity" in the Preamble.[16] This Court has used the term "posterity" on one prior occasion (*United States v. Cruikshank*, 92 U.S. (2 Otto) 542 (1876).), but has defined the term, and its meaning. This Court has held consenting adults cannot use the right of privacy in their own bedroom to engage in homosexual conduct forbidden by State Law. (*Bowers v. Hardwick*, 478 U.S. 186 (1986).) No case has ever reported a female, based on her right to privacy, can do whatever she wishes with her body, including acts of prostitution in the privacy of her own bedroom in violation of state law. *A fortiori*, if the fetus is a person in the Constitutional sense, it does not seem reasonably possible that a woman can, absent justification or excuse, take the life of a fetus in violation of valid state law. This Court observed in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) that statutes which withheld public funds, employees, and facilities from use in non-therapeutic abortions did not offend the Constitution. In doing so, the decision all but wiped *Roe* off the books as an unconditional right to abortion. *Id*, (Scalia, J., concurring).

Weat. (22 U.S.) 1, 188-189, 6 L.Ed. 23 (1824); *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15, 312 (1866); *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877); Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852). Where there are several possible meanings of the words of the constitution, that meaning which will defeat rather than effectuate the constitutional purpose cannot rightly be preferred. *United States v. Classic*, 313 U.S. 299, 316 (1941).

[15] It is not suggested disorder is the reason for *overruling Roe*. Quite the contrary, it is because the Unborn are constitutional persons by virtue of the term Posterity found in the Preamble. The notation is but recognition of a need to resolve, if it can be, the problem.

[16] See, appendix, p. A9.

An analysis of the Preamble[17] itself inexorably leads to the conclusion this Court was misled, because the Unborn are members of "posterity," therefore persons in the Constitutional sense. Moreover, *Roe* is "unsound in principal and unworkable in practice" because it leaves those who would obey the law guessing as to when a Constitutional person is present. *Webster, supra*, 492 U.S. at 518-519; Lynch, POSTERITY: A CONSTITUTIONAL PEG FOR THE UNBORN, 40 American Journal of Jurisprudence 401 (1995).

The above arguments accommodate the needs of women who, for compelling reasons should terminate a pregnancy, the needs of other interested persons, and the constitutional mandate for respect of life, with adequate safe guards against governmental intrusion in what ought to be a private matter. Given the historical debate, anguish of a nation torn asunder, and impact on this court's docket, the court is presented with its first opportunity to review an argument presented in five prior cases by *amicus curiae*, but not raised by the parties in the courts below. The course chartered by this court, evidencing a retreat from *Roe v. Wade*, indicate a more definitive statement as to the rights of the mother, the Unborn, and other interested persons, is needed such that

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[17] "Neither the 5th nor the 14th Amendment defines person. The 14th Amendment defines citizenship. App. p. A10. In other contexts, the court has held that aliens and non-natural persons are persons entitled to Constitutional protection. Not to recognize the Unborn as a person is therefore an anomaly. As "Person" is used without qualification, the most logical place to look for meaning is the Preamble because, while its purpose is not to create right, it does define for whom the rights were created. The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. The Preamble creates two classes of sovereignty: "ourselves" and "our Posterity." Its purpose appears to be to include "Posterity" on an equal footing with, and the same rights as, "ourselves" as evidenced by the parallel structure of the phrase. Therefore, "Posterity," as to those who are lives in being, is synonymous, if not with "citizen," surely with "person." This understanding is consistent with the meaning of posterity in 1776. In 1644, it was argued that "Parliament could no more censure the issue of the mind than it could the issue of the womb." At common law, certain members of future generations, fetuses, were lives in being for the purposes of the Rule Against Perpetuities. Moreover, prenatal injuries were, to a limited extent, recognized at Common Law, and it does not appear that tort actions for the injuries were barred. and "a perpetual union," for the protection of future generations, including the Unborn. [Cites omitted.]" Lynch, op. Cit., 40 AJJ, at 401-02.

the court should grant review of this important issue.

D. THE LOWER COURTS' DECISION ON PETITIONERS' RIGHT TO PRAY IN THE CATHEDRAL IS AN IMPORTANT ISSUE *DE NOVO*, AND INCONSISTENT WITH PRECEDENT.

There is no known reported case where persons of faith were arrested in their own church for praying. The Trial court granted summary judgment against petitioners on the issue finding that prayers could be disruptive. The Ninth Circuit failed, or refused, to address the issue dismissing petitioner's claims with, "When [the peace officers] accepted custody of appellants it was objectively reasonable for [them] to believe that the appellants had been lawfully arrested for disrupting a religious service." App., p. A5.

First of all, the Petitioners were clearly Catholics with a right to be in the Cathedral with the express permission of the Bishop and Msgr. Kidder. Ante, p. 7. Respondents, on the other hand, were guests and when they sought the use of the "reserved seats," the Bishop and Msgr. Kidder ordered them moved to another section. Ante, p. 7.

Secondly, the conduct of the Petitioners was not so egregious as claimed by Respondents. Indeed, the record shows that while opposed to abortion, they conducted themselves in a most peaceful manner. Ante, p. 7. Five cases from this Court illustrate why Petitioners could not be arrested.

In *Pierson v. Ray*, 386 U.S. 547 (1967), Afro-American ministers announced an intention to use a "whites only" restroom in a bus terminal. Police stated arrests would follow if they made the attempt. The Ministers, citing desegregation opinions, made the attempt, were arrested, arraigned, found guilty. The Ministers sued under 42 U.S.C., § 1983. This Court found the judge absolutely immune, limiting the arresting officers to a good faith belief based on the ministers' asserting rights of which they had notice.

In *Edwards v. South Carolina*, 372 U.S. 229 (1963), the court refused to recognize that singing of religious and patriotic songs on the capital steps by civil rights African-American teenagers amounted to "fighting words," or apply the "hostile audience doctrine," even with a finding by state courts

of a restive white crowd.[18] *Accord, Cantwell v. Connecticut, supra,* 310 U.S. 296 (religious speech exempt from control). In this case the prayers are in a Cathedral, with no restive crowd. The only violence was the arrests themselves.

In *Bond v. Floyd,* 385 U.S. 116 (1966), Julian Bond was elected to Georgia State Legislature, but his qualifications were challenged because of his opposition to the Viet Nam war and the operation of the draft laws. At a hearing, he testified he sympathized with those who burned their draft cards, but he never had, had never advocated anyone should, and would be willing and able to take, and abide by, the required oath. The House refused to administer the oath or seat him. This Court found the refusal denied Bond his First Amendment Right to free expression because (1) there was no showing Bond could not take the oath with sincerity and (2) such action could, and would, lead to the stifling of minority views. 385 U.S., at 118-24. In this case, that appears to have been the precise reason for the ouster of the Petitioners— their views on abortion.

In the *per curiam* decision of *Watts v. United States,* 394 U.S. 705 (1969), the court reversed appellant's conviction for violating a statute prohibiting persons from "Knowingly and willfully . . . threatening to take the life or to inflict bodily harm upon the President." In a public rally, Watts indicated that if drafted, "the first man I want to get in my sights is L.B.J." The statute was upheld as necessary for the protection of the president, but must "be interpreted with ... the First Amendment clearly in mind. What is a threat must be clearly distinguished from what is . . . protected speech." The court found Watts' remarks were political hyperbole, not a threat, and that the nation was committed to unrestrained expression and debate, including criticism of the government and government officials. 394 U.S., at 706-708. In this case, clearly there were no threats. Exhortations that Wilson not go to the Cathedral— surely; Prayers— certainly; requests he change his views— most certainly; threats of

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[18] They were protesting denial of educational facilities available to white teenagers, and access to other facilities. Here, Petitioners are protesting use of facilities for what they feel was an improper purpose.

violence – none whatsoever.

Finally, in the *per curiam* case of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the court was faced with an appellant charged with, and convicted of, advocating political reform through violence and assembling with a group advocating criminal syndicalism. The case was based on news film of a Klan rally wherein Klan members, including Brandenburg, discussed a march on Washington, D.C. In reversing, the court held that **advocacy of violence was protected** by the First Amendment **so long as the advocacy did not incite to imminent action,** the key being "incitement."

The prayers could not possibly have incited violence. Scheidler's and Cooke's words were directed towards ending violence. If Petitioners' prayers are advocacy, the advocacy was to end violence directed at the Unborn, not for more violence. The most odious word, abortion, was used in a prayer omitted by Msgr. Kidder, at the end, to end violence towards the Unborn. Objectively, there was nothing amounting to a crime. Petitioners had no subjective intent to incite violence, only to pray. Ante, Statement of Facts. Based on the foregoing, it does not seem reasonably possible that prayers, could be a crime, therefore a reasonable officer would not find probable cause.[19] Thus is presented an important question this court should review at this time.

E. CALIFORNIA PENAL CODE §§ 145 AND 302 WERE APPLIED INCONSISTENTLY WITH PRECEDENT IN THIS COURT

All respondents base the propriety of their conduct upon the application of §§ 145 or 302 of the California Penal Code. App., p. 11. The trial court held that the officers were entitled to rely on the statute, and the Ninth Circuit held that

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[19] Assuming a "place of worship" is *sui generis*, entitled to special protection to prevent religious persecution, the fact is on January 6, 1991, the Cathedral was not being used for a "church function," but a public Event. Whatever the gloss, respondents and the Church had opened the doors of the Cathedral to public controversy when a pro-abortion governor-elect was invited into a pro-life institution. Petitioners had a right to be there to pray. Petitioners could be arrested, if at all, only if they in fact committed an act, other than praying, amounting to a crime. (*Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Board of Airport Com'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) [ban unconstitutional even if a non-public forum; no governmental interest would justify absolute].)

Petitioners lacked standing. App., p. 3.

Based on *Garner*, the courts should have found the existence of those sections irrelevant, because respondents should defend based on what they observed at the scene. Moreover, based on 1st Amendment concerns, Petitioners themselves suffered injury in fact, and because respondents' defense was grounded in, and manifested future reliance on the statute, the court should have found standing based on *Houston v. Hill*, 482 U.S. 451 (1987) [Ordinance making it a crime to "interrupt any policeman"; *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) that "[T]he vagueness ... which would result in giving [peace officers] the power to decide in the first instance whether a given activity is [appropriate to a religious service] present[ed] serious constitutional difficulty." *E.g., Board of Airport Com'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), *citing Lewis v. New Orleans*, 415 U.S. 130, 135-136 (1974).

This court should grant review to resolve this issue.

III.

THE LOWER COURTS APPLIED PRINCIPLES OF § 1983 DEFENSES INCONSISTENTLY WITH PRECEDENT

Notwithstanding the absence of an express defense in 42 U.S.C., § 1983, this Court has historically found implied defenses, such as a qualified good faith defense.[20] However, there is no derivative defense, i.e. immunity is personal[21] to the holder, and cannot be asserted by another.

Whether an officer acted in good faith upon a statute is not relevant. *Generally, Anderson v. Creighton*, 483 U.S. 635 (1987); *Tennessee v. Garner*, 471 U.S. 1, (1985) (Fleeing felon statute declared unconstitutional; office limited to good faith

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[20] *Wood v. Strickland*, 420 U.S. 308 (1974); *Procunier v. Navarett*, 434 U.S. 555; *Carlson v. Green*, 446 U.S. 14 (1980).

[21] *Tenney v. Brandhove*, 341 U.S. 367 (1951) (Legislative aid cannot rely on immunity of legislator); *Pierson v. Ray*, 386 U.S. 547 (1967) (officers cannot rely on immunity of judge); *Dennis v. Sparks*, 449 U.S. 24 (1980) (individuals cannot rely on immunity of judge); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (cabinet members cannot assert presidential immunity); *Owens v. Independence*, 445 U.S. 622 (1978) (Municipality cannot rely on qualified immunity of employees).

belief); *Pierson v. Ray*, 386 U.S. 547 (1967). A Respondent must defend, if at all, based on the facts presented at the time Respondent acted. *Garner*; see also, *Pierson v. Ray*, 386 U.S. 547 (1967)(minister's rights; notice; officers had notice).

In this case, neither the status of §§ 145 and 302, nor the good faith of Colliau, and those who aided and abetted, should have been relevant, but only what they observed, on whether probable cause existed to arrest. Because of this important question, this Court should grant review.

IV.

THERE WERE GENUINE TRIABLE ISSUES OF MATERIAL FACTS PRECLUDING A GRANT OF RESPONDENTS' MOTIONS

A. WILSON, CHIEF OF STAFF WHITE, & THE COMMITTEES.

The Ninth Circuit held that Petitioners presented no evidence that either Wilson, or his Chief of Staff White caused the arrests. App., p. A2. This is at odds with the record below, with corroborating evidence of Respondent Pennel's deposition. Ante, p. 10.

Both, if they did not directly start the arrests, surely made statements reasonably understood to start the arrests, and by their presence in a position to halt the arrests. Based on Scheuer, the motion should have been denied. This court should grant review to resolve the issue.

Governors of a state are subject to *Bivens-1983* suits; hence it would appear that a governor-elect would similarly be subject to suit. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *C.f., Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) (11th Amendment; § 1983 inapplicable to States absent clear Congressional intentions) *with Hafner v. Melo*, 502 U.S. 21, 25-31 (1991) (State officers m ay be held liable in individual capacity); *Soldal v. Cook County*, 506 U.S. 56 (1992).

Where an entity does an act by virtue of a policy maker, and surely Wilson and White were policy makers, then the entity should be liable. *E.g., Oklahoma v. Tuttle*, 471 U.S. 808 (1985) *with Pembaur v. Cincinnati*, 475 U.S. 469 (1986); *Canton v. Harris*, 489 U.S. 378 (1989).

Based on *Tennessee v. Garner*, 471 U.S. 1 (1985), Respondents could not rely on state law, but the facts, and *Soldal v. Cook County*, 506 U.S. 56 (1992), use and abuse of police power to achieve what they could not do as a private person, the courts should have found a triable issue of fact. It takes this court to resolve this important issue.

B. ALL PEACE OFFICERS

Referring to these officers as "The Custody Officers" (Excerpt, p. 1280.), the Court, in effect, held these officers were entitled to immunity because § 302 had not been held unconstitutional. (Excerpt, p. 1282.) The order conflicts with *Tennessee v. Garner*, 471 U.S. 1, (1985) , a statute is not relevant, and precedent that the good faith of others is not relevant, [22] because the issue of good faith is a matter for the jury to decide based on the facts confronting the actor. (Ante, p. 26.) The decision is clearly at odds with this Court's precedent requiring review.

C. CITY OF SACRAMENTO, TWILLING, & DOWDEN

The Ninth Circuit mischaracterized the briefs presented to it. App., p. A6-7. The evidence shows Lt. Twilling was inside the church at the time arrests were made, participated in some arrests, and as a senior officer, he made a policy decision in arresting and accepting detainees, such that not only he, but City, should have been required to stand trial.

Petitioners also had overwhelming evidence that City was aware that Dowden was a loose cannon on the presentation of the spoliation doctrine, and direct evidence of other bad conduct. (Excerpt, p. 1004-21.) Moreover, there was direct evidence a policy maker, Twilling, approved or otherwise ratified Dowden's conduct at the scene. Ante, p. 10.

Because the decision conflicts with precedent from this court, this Court should grant review.

V.

THE PRETRIAL RULINGS PREJUDICED PETITIONERS AT JURY TRIAL

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[22] See, text and footnote at page 26, ante.

The Ninth Circuit held there was no objection. [23] Petitioners attempted to change the court's mind, in satisfaction of Rule 51, but were met with an adamant court. (Excerpt, pp. 1503-04, 1507-08.)

Where a jury is misdirected with an instruction that permits the jury to consider protected speech as a crime, reversal is automatic. (*Henry v. Collins*, 380 U.S. 356, 357-58 (1965) (Per curiam). A misinterpretation of the law is prejudicial where the misinterpretation either allows evidence to go to the jury, or precludes the jury from consideration of the appropriate standard. (*Continental Ore Co. v. Union Carbide & Caron Corp.*, 370 U.S. 690.)

Based on the summary judgment motion, the court denied Petitioners an opportunity to go into prior bad acts of Dowden, including the use of a baseball bat. Yet it allowed Respondent to claim there were no prior bad acts. (Excerpt, p. 1516A, 1516B.) That was prejudicial to Reali.

In shaping the case through the motions for summary judgment, and final pre-trial order, the court so shaped the case it allowed the jury to consider the Petitioners' speech a crime furnishing probable cause for the arrests. It then compounded the error by allowing the jury to focus on whether Respondents acted in good faith reliance on § 302. Thus, is presented an important issue which should be reviewed by this court

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[23] On Rule 56 motions, the court uses the "genuine issue" test, whereas on Rule 50 motions, the court uses "reasonable jury" rule, both of which are very close, with most courts treating them the same. The sole difference between a Rule 50 and Rule 56 motion is procedural; Rule 56 occurs before trial and is based on documents whereas Rule 50 occurs after the evidence has been submitted to the jury. *Generally, Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 744-45, fn. 11. In either event, the Court must advise the parties of the substantive law and rules of evidence it is applying to reach its result in Rule 56 cases (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).), and when submitting the case to the jury. (FRCP, R. 51.) The failure to make a timely objection may be disregarded if the party's position was previously made clear to the court and further objection would be unavailing. (33 Fed. Proc., L.Ed., Trial § 77:280 (1995), *citing, inter alia, Brown v. Avemco*, 603 F.2d 1367 (9th Cir. 1979).) Here Petitioners lost on the motions for summary judgment and reconsideration. Any defect before the trial judge at the closing stages should have been ignored, because the judge made it clear he would not change his mind.

CONCLUSION

WHEREFORE, for all, or any one of, the foregoing reasons, this court should grant the writ of *certiorari* to the Ninth Circuit, and summarily reverse and remand, or set the matter for briefing, argument, and such other and further relief as the court deems just under the circumstances.

Dated: May 16, 1997

RESPECTFULLY SUBMITTED,

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APPENDIX

MEMORANDUM, 2/18/97, Ninth Circuit

FILED
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CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

United States Court Of Appeals
For The Ninth Circuit

ALBIN RHOMBERG,
v.
PETE WILSON, etc., et al.,

No. 95-16244
[DC CV-92-20 GEB (JFM)]
MEMORANDUM*

JOHN BURNS, et al.,
v.
PETE WILSON, etc. et al.,

No. 95-16257
[DC CV-92-20 GEB (JFM)]

[-1-]

Appeal from the United States District Court
For the Eastern District of California
Garland E. Burrell, Jr., District Judge, Presiding
Argued and Submitted October 3, 1996
San Francisco, California

Before: SKOPIL and FLETCHER, Circuit Judges, and SMITH,** District Judge

Appellants, abortion protesters, were arrested at the Cathedral of the Blessed Sacrament in Sacramento, California during an ecumenical prayer service that was part of the inauguration of Pete Wilson to his first term as governor. Appellants brought this action under 42 U.S.C. § 1983, together with several pendent state tort claims, against Governor Pete Wilson, various members of his campaign staff, his inaugural and campaign committees and their individual volunteers and members, California state police officers, Sacramento city police officers and the City of Sacramento, alleging violation of their First

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by 9th Cir. R. 36-3.

** Honorable Fern M. Smith, United States District Judge for the Northern District of California, sitting by designation

Amendment right to speak and their Fourth Amendment right to be free of unreasonable seizure. They also sued California Attorney General Daniel E. Lungren and California Chief of Police Duane Lowe to enjoin the enforcement of and to declare unconstitutional Cal. Penal Code Ann. § 302, which prohibits the disruption of a religious service. All of the Defendants moved for summary judgment asserting qualified immunity, lack of either municipal or supervisorial liability, or lack of standing. The district court granted summary judgment to all defendants except for state police officers Bartucco and Ostergar, Campaign Committee volunteer Russell Colliau, and City police officer Dowden. After a nine-day trial, a jury returned a verdict in favor of these defendants. Appellants appeal the grants of summary judgment, and contend that at trial there was reversible error as a result of erroneous jury instructions. They also appeal the denial of their motion to recuse the district court judge. We have jurisdiction under 28 U.S.C., § 1291 and affirm.

I. Summary Judgment

We review de novo the district court's grant of summary judgment to certain of the defendants. *Bagdadi v. Nazar*, 84 F. 3d 1194, 1197 (9th Cir. 1996). We affirm.

A. GOVERNOR WILSON AND ROBERT WHITE:

Appellants presented no evidence that Governor Wilson or Robert White caused the arrests at issue or participated in making them. *See Monell v. New York City Dept. of Social Services*, 436

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U.S. 658, 691-695 (1978) (rejecting respondeat superior liability) for § 1983 claims); *Johnson v. Duffy*, 588 F. 2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a constitutional right if he does an affirmative act or participates in another's affirmative act).

B. DANIEL LUNGREN AND DUANE LOWE:

Appellants seek to enjoin enforcement of and to declare unconstitutional Cal. Penal Codes 302, which makes the

willful disturbance of a religious service a misdemeanor. Cal. Penal Code Ann. § 302 (West 1988).[1] Appellants lack standing. Appellants, who are seeking prospective injunctive relief in a civil action against these defendants, failed to demonstrate a credible threat of immediate future harm. *See, Smith v. City of Fontana*, 818 F.2d 1411, 1422 (9th Cir.), cert. denied, 484 U.S. 935 (1987). They have not suffered criminal conviction, do not face pending prosecution under the act and they have not alleged that they are likely to engage in future conduct which would violate § 302. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (denying standing for injunctive relief to victim of police chokehold because he could not demonstrate a real and immediate threat that he would again be stopped for a traffic offense and illegally choked into

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unconsciousness). Past unlawful conduct may be probative on the concreteness of a concern for future prosecution for such conduct, but it does not in itself show a present case or controversy that would warrant injunctive relief. See id., at 106.

Appellants also claim third-party standing to vindicate the rights of the Unborn. Even if we conceded for the purpose of argument that the Unborn were third-parties for purposes of this lawsuit, appellants offer no evidence or reasoning as to why their claim should cause us to depart from the U.S. Supreme Court's general rule that: "Ordinarily, one may not claim standing . . . to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). Summary judgment dismissing claims against these defendants was proper.

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[1] Cal. Penal Code § 302: "Every person who willfully disturbs or disquiets any assemblage of people met for religious worship, by profane discourse, rude or indecent behavior, or by any unnecessary noise, either within the place where such meeting is held, or so near it as to disturb the order and solemnity of the meeting, is guilty of a misdemeanor."

C. THE COMMITTEE DEFENDANTS:

Appellants presented no evidence that Martin Wilson, Director of the Pete Wilson for Governor Campaign Committee, or Tom Cooper, a committee volunteer, participated in any way in the arrests at the Cathedral. Summary judgment was therefore properly granted as to them. *See Hansen v. Black*, 855 F.2d 642, 646 (9th Cir. 1989) (supervisory liability requires personal involvement in the constitutional deprivation or a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation).

Appellants argued that the Campaign Committee was liable for the alleged wrongdoing of the Inaugural Committee. They failed, however, to offer any evidence indicating that an alter-ego

relationship existed between the Campaign Committee and the Inaugural Committee. In order to establish alter ego liability, appellants must establish: 1) control of one entity by another, 2) that one entity is the mere conduit of the business of the other, and 3) recognition of a separate existence would occasion fraud and injustice. *See Calvert v. Huckins*, 875 F. Supp. 674, 678 (E.D. Cal. 1991); *Marr v. Postal Union Life Ins. Co.*, 105 P.2d 649, 654 (Cal. Ct. App. 1940). Appellants failed to establish that such a relationship existed between the committees. Further, the claims against the Inaugural Committee were derivative of the claims made against committee volunteer Colliau, who was found by the jury not to have violated any constitutional rights in his citizen's arrest of appellants. Therefore, appellants suffered no constitutional injury and dismissal as to these defendants was proper.

D. STATE POLICE/CUSTODY OFFICERS:

California State Police Officers Everett, MacDonald, Pennel, Perez, and Peters ("Custody Officers"), who accepted custody of appellants after they had been placed under citizen's arrest, were properly granted qualified immunity because they relied upon clearly established law and could have believed as reasonable officers that their conduct was

lawful. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Act UP!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). When they accepted custody of appellants it was objectively reasonable for the Custody Officers to believe that the appellants had been lawfully arrested for disrupting a religious service.

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An officer who acts in reliance upon a duly-enacted statute or ordinance is ordinarily entitled to qualified immunity. *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994). *C.f., Chew v. Gates*, 27 F.3d 1432, 1447-49 (9th Cir. 1994), *cert.* denied, ___ U.S. ___, 115 S. Ct. 1097 (1995) (holding, in part, that officers implementing a long-established policy are entitled to qualified immunity where no then-existing case law demonstrated that the particular policy was unconstitutional). Where a statute authorizes official conduct that is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity. *Grossman*, 33 F.3d at 1209. That is not the case here. At the time of these arrests, § 302 had been upheld as constitutional by California appellate courts. *People v. Cruz*, 101 Cal. Rptr. 711, 717-718 (Cal. App. Dep't Super. Ct. 1972). There was no contrary authority. We conclude that it was objectively reasonable for the officers to rely upon it. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

State police officer Harder, who arrested appellants Scheidler and Cooke, also was properly granted summary judgment on the grounds of qualified immunity. It was objectively reasonable for Officer Harder to believe that he had probable cause to arrest appellant Scheidler based upon the undisputed fact that he was present when Scheidler spoke out loudly during the service and attempted to unfurl a banner reading "Sacrilege," apparently intending to attract the attention of Governor-elect Wilson. Officer Harder arrested appellant Cooke after Cooke approached

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within three feet of the Governor-elect and stated loudly, "What are you going to do about murdering millions of Unborn children in this state?" It would be reasonable to interpret this statement, made in such close proximity, as threatening. *See Hunter v. Bryant*, 502 U.S. 224, 228-29 (1991) (even assuming Secret Service agents lacked probable cause for an arrest made in an effort to protect the President, the Court held them entitled to qualified immunity); *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects all but the plainly incompetent or those who knowingly violate the law); *ActUP!/Portland*, 988 F.2d at 871 (police officers who objectively believe that their conduct is lawful in light of clearly established principles are immune from civil damages); *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1443 (9th Cir. 1991) ("Even absent probable cause, qualified immunity is available if a reasonable police officer could have believed that his or her conduct was lawful.").

State Officer Lt. Hensley, supervisor of the Custody Officers, was properly granted summary judgment. His subordinates acted lawfully in accepting custody of appellants. In the absence of constitutional injury caused by his subordinates, he cannot be liable for failure to supervise.

E. CITY OF SACRAMENTO:

Appellants made two claims against the City of Sacramento. First, that it had a policy or a custom of not inquiring into the validity of arrests made by citizens. Second, that it failed to adequately select, train, and supervise Sgt. Dowden, who held

appellant Reali in custody after her arrest. Summary judgment was proper as to both claims. Appellants alleged no facts to support the claim that the City has either a policy or custom of not inquiring into the validity of arrests made by citizens. *Monell*, 436 U.S. at 694. A policy may be shown "where – and only where – a deliberate choice to follow a course of action is made [by policymakers] from among various alternatives." *Meehan v. County of Los Angeles*, 856

F.2d 102, 107 (9th Cir. 1988) (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 483-84 (1986)). It is the Petitioner's burden to prove official policy by more than "bald allegation." *Polk County v. Dodson*, 454 U.S. 312, 326 (1981). She must show that official policy is "the moving force of the constitutional violation" in order to establish liability. *Monell*, 436 U.S. at 694. At the "very least there must be an affirmative link between the policy and the particular constitutional violation alleged." *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). The appellants have shown neither a policy or consequences from it that would establish municipal liability here.

The district court properly dismissed appellants' claims against the City for failure to adequately select, train, and supervise Sgt. Dowden. When a person sues under § 1983 for an allegedly unconstitutional arrest, the city cannot be held liable absent a constitutional violation by the arresting officer. Grossman, 33 F. 3rd at 1203 (quoting City of Los Angeles v. Heller, 475 U.S. 796 (1986)). The specific constitutional violation alleged here is that Sgt. Dowden used excessive force against appellant Reali in removing her from the Cathedral and while she

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was in his custody. However, the jury's finding that the force Dowden used was reasonable eliminates appellants' constitutional claim against the City, because the appellant suffered no constitutional injury. Summary judgment was properly granted.

F. CITY POLICE OFFICERS:

Finally, the district court properly granted summary judgment to City police officer Lt. Twilling, who supervised the City police officers present in the Cathedral. Appellants offered no evidence that he participated directly in the arrests at issue. The officers that he supervised acted constitutionally in accepting custody of the appellants. He also is entitled to qualified immunity for accepting custody for appellants Reali and Szabo from state police officers outside of the Cathedral because it was objectively reasonable for him

to believe his actions were authorized by statute. See Augustine v. McDonald, 770 F.2d 1442, 1445-46 (9th Cir. 1985) (an officer is entitled to qualified immunity where his or her actions were authorized by a statute that was not clearly unconstitutional).

II. Recusal Motion

We review the denial of a motion for recusal for an abuse of discretion. *E & J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1294 (9th Cir. 1992). Appellant's contend that Judge Burrell's connections to both Governor Wilson and the City of Sacramento were such that his impartiality might reasonably be questioned, and that he should have recused himself pursuant to 28 U.S.C., §

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455. *See Preston v. United States*, 923 F.2d 731, 734 (9th Cir. 1991) (Plaintiffs must present facts demonstrating that a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned). We reject this contention. Senator Wilson's recommendation alone does not establish a basis for questioning Judge Burrell's impartiality. *See Home Placement Service v. Providence Journal Co.*, 739 F.2d 671, 675 (1st Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985). Nor does Judge Burrell's former employment as a city attorney establish a sufficient basis for questioning his impartiality. *See United States v. Heffington*, 952 F.2d 275, 278-79 (9th Cir. 1991) (holding that activities during government employment that are unrelated to the merits of the case at issue do not require recusal); *Tedder v. Odel*, 890 F.2d 210, 212 (9th Cir. 1989) (disqualification based on government employment is required when judge has participated earlier in a governmental capacity in the same proceeding). Accordingly, we affirm the denial of appellants' recusal motion.

III. Jury Instructions

Appellants claim that the jury was misdirected with instructions that permitted them to "consider protected speech as a crime" and that this constitutes reversible error. They did not, however, object at trial to these instructions, as re-

quired by Fed. R. Civ. P. 51, which requires that a party state distinctly the matter objected to and the grounds for that objection at trial. The consequences of this failure is waiver of the right to

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claim instructional error on appeal. *See Hammer v. Gross*, 932 F2d 842, 847 (9th Cir.), *cert. denied*, 502 U.S. 980 (1991); *Deland v. Old Republic Life Insurance Co.*, 758 F.2d 1331, 1337 (9th Cir. 1985). Because no objection was made, we affirm the jury verdicts reached at trial.

IV. Conclusion

We affirm. Summary judgment on the § 1983 claims was properly granted based upon lack of standing, qualified immunity, or lack of municipal or supervisorial liability. Appellants did not object to jury instructions. The other alleged trial errors did not present a basis for overturning the jury verdicts in favor of defendants. We deny the state Appellees' request for attorney's fees. Although the claims made by appellants ultimately lack merit, they relate to important constitutional rights, and some of the claims went to trial. We decline to find them frivolous. *See Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (a fee award will not be made unless the Petitioner's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith.).

AFFIRMED

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EXCERPTS –
CONSTITUTION OF THE UNITED STATES

Preamble

"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to **ourselves and our Posterity**, do ordain and establish this Constitution for the United States of America."

Amendment 1 (Dec. 15, 1791)

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment 4 (Dec. 15, 1791)

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment 14 (July 28, 1868)

"§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

EXCERPTS– THE CALIFORNIA PENAL CODE

California Penal Code § 142 (1990)

"(a) Any peace officer who has the authority to receive or arrest a person charged with a criminal offense and willfully refuses to receive or arrest such person shall be punished by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment.

"(b) Notwithstanding subdivision (a), the sheriff may determine whether any jail, institution, or facility under his direction shall be designated as a reception, holding, or confinement facility, or shall be used for several of such purposes, and may designate the class of prisoners for which such facility shall be used."

California Penal Code § 302 (1990)

"**Disturbing religious meetings; punishment; community service; waiver** [¶] (a) Every person who willfully disturbs or disquiets any assemblage of people met for religious worship at a tax-exempt place of worship, by profane discourse, rude or indecent behavior, or by any unnecessary noise, either within the place where the meeting is held, or so near it as to disturb the order and solemnity of the meeting, is guilty of a misdemeanor punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail for a period not exceeding six months, or by both fine and imprisonment. [¶] (b) A court may require performance of community service of not less than 20 hours and not exceeding 40 hours as an alternative to imprisonment and fine. [¶] (c) In addition to the penalty set forth in subdivision (a), a person who has suffered a previous conviction of a violation of this section or section 403, shall be required to perform community service of not less than 40 hours and not exceeding 80 hours. [¶] (d) In addition to the penalty set forth in subdivision (a), a person who has suffered two or more previous convictions of a violation of this section or section 403, shall be required to perform community service of not less than 80 hours and not exceeding 120 hours. [¶] (e) The existence of any fact which would bring a person under subdivision (c) or (d) shall be alleged in the complaint, information or indictment and either: (1) Admitted by the Respondent in open court. [¶] (2) Found to be true by a jury trying the issue of guilt. [¶] (3) Found to be true by the court where guilt is established by a plea of guilty or nolo contendere. [¶] (4) Found to be true by trial by court sitting without a jury. [¶] (f) Upon conviction of any person under this section for disturbances of religious worship, the court may, in accordance with the victim's consent, order the Respondent to perform a portion of, or all of, the required community service at the place where the disturbance of religious worship occurred. [¶] (g) The court may waive the mandatory minimum requirements for community service whenever it is in the interest of justice to do so. When a waiver is granted, the court shall state on the

record all reasons supporting the waiver. (*Enacted 1872. Amended by Stats. 1905, c. 499, p. 657, § 1; Stats. 1990, c. 822 (S.B.2483), § 1.*)" Before January 1, 1991, the operative section read "Every person who willfully disturbs or disquiets any assemblage of people met for religious worship at a tax-exempt place of worship, by profane discourse, rude or indecent behavior, or by any unnecessary noise, either within the place where the meeting is held, or so near it as to disturb the order and solemnity of the meeting, is guilty of a misdemeanor."

California Penal Code, § 834 (1990)

"**Arrest Defined; persons authorized to arrest.** [¶] ARREST DEFINED. BY WHOM DEFINED. Arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."

California Penal Code, § 836(b) (1990)

"Any time a peace officer is called out on a domestic call, it shall be mandatory that the officer make a good faith effort to inform the victim of his or her right to make a citizen's arrest. The information shall include advising the victim how to safely execute the arrest."

California Penal Code, § 837 (1990)

"**Private persons; authority to arrest** [¶] **ARRESTS BY PRIVATE PERSONS.** A private person may arrest another: [¶] 1. For a public offense committed or attempted in his presence. [¶] 2. When the person arrested has committed a felony, although not in his presence. [¶] 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it. (*Enacted* 1872)"